

**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2011-100-000050  
[2013] NZWHT AUCKLAND 1**

BETWEEN VAUGHAN STUART DARBY AND MARY  
ANN DARBY as Trustees of the DARBY  
TRUST  
Claimants

AND AUCKLAND COUNCIL  
First Respondent

AND ANTHONY LAWRENCE ALLEN  
Second Respondent

AND CEDRIC DUDLEY FRENCH  
Third Respondent

AND DARYN MCDONALD  
(Removed)  
Fourth Respondent

Hearing: 27, 28 and 29 August 2012

Appearances: S Wroe for the claimants.  
F Divich for the first respondent.  
J Holland for the second respondent.  
M Meier for the third respondent.

Decision: 8 February 2013

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**FINAL DETERMINATION**  
**Adjudicator: P R Cogswell**

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## INTRODUCTION

[1] The claimants own a leaky home at 8 Tawhana Crescent, Red Beach, Orewa. They purchased their home in April 2004 from Venus Investments Limited.

[2] The claimants discovered damage to their home from the entry of water around 2007 or 2008 and in 2009 applied to the Department of Building and Housing for an assessor's report.

[3] That report and the eligibility certificate that accompanied it determined that the claimants' home was a leaky home in terms of the legislation. The claimants are yet to carry out repair work to their home. The proposed repair costs are significant.

[4] The claimants commenced claims against:

- (a) Auckland Council, the relevant territorial authority.
- (b) Anthony Lawrence Allen, who is alleged to have been the developer of the property or the head contractor or the project manager.
- (c) Cedric Dudley French, who is alleged to have been the builder of the house.

[5] The claimants seek judgment against the Council, Mr Allen and Mr French in relation to their respective roles in the construction and certification of their home. All respondents defended the Darby's claims and advanced claims of contribution and/or indemnity against each other.

## QUANTUM OF THIS CLAIM

[6] At the commencement of the adjudication hearing, the Tribunal was advised that the parties had agreed the amount of the claimants' claim was agreed to be \$511,611. That sum is calculated as follows:

Estimated repair costs	\$395,000
Pre-remedial costs	\$62,078

Consequential losses	\$22,533
General damages	\$25,000
Interest	\$7,000
<b>TOTAL</b>	<b>\$511,611</b>

[7] As a result of the parties' agreement as to quantum, no quantity survey evidence was called. This determination proceeds on the basis that the total quantum at issue is \$511,611.

[8] The parties also confirmed that I did not need to consider any issues raised by the pleaded defences of contributory negligence.

### **PARTIAL DETERMINATION**

[9] As a result of an admission given by the Council at the commencement of the hearing, judgment was entered in favour of the claimants against the Council. That determination is contained in my partial determination dated 18 December 2012.

[10] The effect of the partial determination against the Council means that this determination is focused on:

- (a) The liability of Mr Allen and Mr French to the claimants.
- (b) The apportionment of the agreed quantum amongst any respondent found liable in terms of the pleaded claims for contribution.

### **ISSUES FOR DETERMINATION**

[11] The issues for determination in this claim are:

- (a) What are the defects that led to the entry of water into the claimants' home and the consequent damage suffered by it?
- (b) Was Mr Allen a developer and/or head contractor and/or project manager and did he breach any duties of care he owed to the claimants in any of those roles?
- (c) Is Mr Allen liable to the Council in deceit?

- (d) Was Mr French the builder of the claimants' home and did he breach any duty of care he owed to them?
- (e) If either Mr Allen or Mr French is liable to the claimants, then how should the agreed quantum of damages be apportioned amongst them and the Council?

**(a) What are the defects that led to the entry and water into the claimants' home and the consequent damage suffered by it?**

[12] There was relatively little disagreement between the building experts about the defects that caused damage to the claimants' home. The claimants' expert, Gérard Ball of Maynard Marks identified five key defects.<sup>1</sup> Those defects were:

- (a) Inadequate installation of the cladding system resulting in extensive cracking of the fibre cement cladding.
- (b) Insufficiently constructed cladding base detail, including a lack of cladding clearances to the adjacent ground.
- (c) Insufficiently waterproofed horizontal surfaces of balustrade and parapet walls.
- (d) Inadequately installed flashings to window and door joinery.
- (e) Inadequately waterproofed decks.

*First defect - Installation of cladding system*

[13] The cladding system on this house suffers from extensive cracking. That cracking allows moisture to enter the cladding causing damage to the structure of the dwelling. There is widespread cracking on all joints in the cladding system. Mr Ball characterised this defect as a primary defect that would on its own be sufficient to require a full reclad of the house.

[14] A significant aspect of this claim is that the cladding system specified in the consented plans was not installed. The drawings specified Hardibacker with stucco plaster as the cladding system. The cladding system used in the construction was a Harditex cladding system with a plaster coating. The

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<sup>1</sup> Agreed Common Bundle of Documents at pages 544 -545.

change to the cladding system was not the subject of amended plans lodged with the Council.

[15] There are two main issues contributing to the failure of the cladding system. These are:

- (a) The lack of vertical movement control joints on areas of cladding exceeding 5.4 metres and the lack of a horizontal control joint at the inter-storey floor joist level; and
- (b) The failure of the adhesion of the plaster to its substrate.

[16] The assessor's report concluded that the joints in the fibre cement sheets when closely examined appeared outwardly to be in general accordance with James Hardie Technical Information (Feb 1996) Harditex. The assessor's report stated that there had clearly been a lack of adhesion between the jointing compound and the fibre cement sheet.

[17] Mr Ball's evidence was that the cladding system was installed without control joints. This was confirmed by Mr French.

[18] The building experts agreed that the primary cause of the failure of the cladding system was the adhesion of the plaster to the fibre cement substrate and, in particular, the delamination of the plaster from the joints in the fibre cement substrate. The delamination of the joints was due to the lack of priming of the joints of the fibre cement sheets. This was a role that would have been undertaken by the plasterer. It was not carried out by Mr French. The building experts were in agreement that the plastering was the cause of the failure of the joints in this cladding system.

[19] There was widespread cracking on all joints in the cladding system. This was so even in walls of as little as 1.5 metres in length. This arose from a failure in the jointing system, not a lack of control joints.

[20] The building experts were not able to agree on whether and if so, the extent to which, the absence of control joints by themselves contributed to the failure of the cladding system. Mr Howarth noted that the building had many short wall spans far less than the maximum 5.4 metres where joints had

cracked and delaminated. Examples of this can be seen in photograph 2.1 of Mr Ball's report.<sup>2</sup>

[21] The building experts were largely unable to agree whether or not the absence of control joints to the one wall which exceeded 5.4 metres by themselves was the cause of any of the defects in the cladding system of this house. Mr Ball's view was that they were a contributing factor. Mr Darling and the assessor considered that the lack of control joints was not causative of the failure of the cladding system because of the defective plastering. Nor were the building experts able to agree that the absence of one inter-storey joint contributed to the damage to the cladding system and consequent entry of water to the building envelope.

[22] Another factor that contributed to the failure of the cladding system was the use of a dark coloured paint which exceeded the applicable reflective value. The house was painted in a colour that was below 40 per cent reflective value. The building experts were in agreement that the colour was too dark and by itself would have caused problems in the cladding.

[23] Having considered the evidence of the building experts, I find that the primary cause of the failure of the cladding system of this house is the inadequate application of the plaster coating, in particular, a failure in the plaster jointing system. According to the claimants' expert, the biggest issue was the adhesion of the plaster and the jointing system used on the cladding. The experts agree that this work would have been done by the plasterer.

[24] The colour of the paint used on the cladding also contributed to the failure of the cladding system.

[25] Finally, the lack of control joints in the two discrete areas identified also contributed to the failure of the cladding system. However, the contribution of the lack of control joints was minimal when considered with the serious failure of the jointing system and the dark paint.

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<sup>2</sup> Above n1.

*Second Defect - Insufficiently constructed cladding base detail including a lack of cladding clearances to the adjacent ground*

[26] Mr Ball's evidence is that there were insufficient safeguards against moisture ingress through capillary action at the base of the cladding. This is the second of the defects that Mr Ball characterised as a primary defect that would on its own be sufficient to require a full reclad of the house.

[27] Mr Ball's evidence is that Acceptable Solution E2/AS1 was not followed in the construction of this house, because:

- (a) In certain areas (around the main entrance, on the first floor decks and the ground floor on the south-west and north-west elevations) the fibre cement cladding finishes in close proximity with the adjacent ground and the fibre cement cladding at the base was not properly constructed.
- (b) In certain areas (around the main entrance, on the first floor decks and the ground floor on the south-west and north-west elevations) the bottom plate does not overhang the foundations and no capillary break has been provided between the back of the cladding and the foundations; and
- (c) In places the bottom edge of the fibre cement cladding sheets have not been texture coated.

[28] Mr Ball's opinion is that where the absorbent fibre cement cladding terminates in close proximity to these horizontal surfaces it provides the potential for moisture to wick up through the cladding itself or between the cladding and the substrate (such as the concrete foundations) through capillary action.

[29] His opinion is that in these locations the construction or installation of the fibre cement cladding at the base is not in accordance with trade literature applicable at the time of construction. Also, the bottom plate fails to overhang the foundations and no capillary break has been provided between the back of the cladding and the foundations, which is required to prevent moisture wicking up behind the cladding.



[30] Further, the bottom edge of the absorbent fibre cement sheets have not been texture coated in locations which will also provide the potential for moisture running down to the base of the cladding to wick up the cladding even where the cladding to ground clearances are sufficient.

[31] The assessor's report mirrored these concerns. He noted the existence of raised moisture readings in these locations.

[32] There was some disagreement between the building experts about the extent to which this cladding detail actually caused damage to the dwelling. Certainly in relation to the entry to the house there was agreement that around the entry door the fibre cement cladding was too close to the ground when initially installed.

[33] The experts agreed, however, that the subsequent installation of landscaping and the concrete driveways caused the ground levels to become too high.

[34] By reference to the photographs introduced by Mr Allen,<sup>3</sup> there is a clear change in the ground levels between that shown in photograph five and photograph 13. The experts were of the view that the clearances shown in photograph five were adequate.

[35] Mr Howarth found actual damage in the north-eastern corner around the garage door. There were other likely future areas of damage identified by the experts. They were in the western elevation by the rear office, the lower bedroom, the south-eastern office and the northern elevation by the en suite.

[36] The experts were of the opinion that the ground clearances on the decks were inadequate. In relation to the area where the deck joined the building, that wall cladding was continuous with the deck bolted on to it. That was what was specified in the consented plans. The cladding on the balustrade walls of the decks was too close to the deck tiles.

[37] Messrs Ball and Darling, were of the view that these cladding and ground clearance issues were sufficient to require a full reclad, but the

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<sup>3</sup> Exhibit "D".

assessor was of a different view and pointed to other defects as being of more potency.

*Third defect - Insufficiently waterproofed horizontal surfaces of balustrade and parapet walls*

[38] The next defect identified by the building experts as insufficiently waterproofed horizontal surfaces of balustrade and parapet walls. Mr Ball considers this to be the first of the secondary defects. He considers this defect to have caused extensive damage to the house, but that in isolation it would not be sufficient to create the need for a full reclad.

[39] The top of the parapet walls to the first floor and the deck balustrades on the north-east and north-west elevations were originally finished with texture coated fibre cement, laid horizontally and near flat. Ineffective waterproofing and the lack of any fall have allowed moisture to collect upon the horizontal surface and ingress via pinhole penetrations in the paint/ texture coating, causing decay damage to the framing below.

[40] The parapet is not constructed as shown on the consented plans. Those plans showed the parapet being clad on sides and top with solid plaster on wire mesh. The top has a five degree back slope and the feature band is formed as part of the solid plaster cladding.

[41] Metal cap flashings were installed to these surfaces, I assume in response to concerns about water entry. They are not shown on the consented plans, although were noted by the Council officers during their inspections. The assessor notes that they are failing and allowing water entry.

[42] The experts agreed that the pre-nailed frames which formed the parapet and balustrade walls were supplied with flat tops. Mr Howarth's evidence was that it was the plasterer's job to ensure that a five degree back fall was formed on the top of those parapet and balustrade walls. The installation of a fillet would have provided the requisite five degree back fall. That fillet was not installed, as confirmed by Mr Ball.

[43] The position regarding the parapet and balustrade walls is complicated by the fact that the metal capping was retrofitted to those areas,

no doubt in an attempt to prevent the ingress of water. The metal cappings installed to those areas were installed flat and a saddle flashing was not installed where they abutted the adjacent vertical walls. This was a further building defect which led to the ingress of water.

[44] The evidence of the building experts was that the cap flashing was installed after the parapet and balustrade walls were painted. They were simply abutted into the adjacent wall and were a separate cause of damage.

[45] The experts were in agreement that by the time the cap flashings were installed, decay and damage had already commenced in those areas as a result of the inadequately waterproofed horizontal surfaces of those areas. While they stopped further water entry, the damage had already been done. Reference is made to photograph 2.9 of Mr Ball's report.

[46] Mr Ball found that the parapet and balustrade walls only had texture coating on their tops. There was no waterproofing at all. They were flat. This was contrary to the relevant Harditex literature. The experts were of the view that a product such as AGA Superflex should have been applied on top of the Harditex sheet and that would have been installed by either the builder or the plasterer.

[47] Having considered the expert evidence, I find that the water entry through the tops of the balustrade and parapet walls was due to the absence of waterproofing to the horizontal surfaces and the lack of a five degree fall as prescribed by the relevant technical information set out in Mr Ball's report.<sup>4</sup> This work was the responsibility of either the builder or the plasterer.

*Fourth defect - Inadequately installed flashings to window and door joinery*

[48] Mr Ball's evidence is that the window and door joinery flashings were not properly installed or were not present. This, too, is a secondary defect in his view.

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<sup>4</sup> Above n1 at page 544.

[49] He observed that the head flashing installed over a window on the north-east elevation serving the en suite to bedroom one does not extend sufficiently past the jambs. In addition, the building wrap is lapped behind the flashing upstand and does not direct water outwards.

[50] It was also observed that the Harditex cladding was finished hard down on the head flashing projection and does not incorporate the closed-cell compressed foam strip demanded by the manufacturer's installation instructions. Finally, the manufacturer's technical information recommended the use of a sill flashing which had not been used.

[51] Mr Ball's evidence was that the approved drawings provided insufficient detail to enable the builder to install the windows and doors in accordance with the minimum requirements of the New Zealand Building Code. There is no reference in the approved documents to the change to the Harditex cladding system.

[52] The experts agreed that the width of the head flashing beyond the jambs on this house was at times adequate, but were at other times inadequate. No expert was able to definitively state that this particular defect had led to any damage. Mr Ball noted that photograph 2.15 of his report appeared to show damage at the location of the head flashing. He agreed with the proposition of the assessor that the joinery would have leaked even if the joinery was installed as per the James Hardie technical information.

[53] The assessor's view was that the length of the overhang of the head flashing was irrelevant because in his experience there was always an issue with water entry at the termination of the head flashing where it cuts into the cladding. His view was that any damage around the windows was more to do with the cladding cracks than the installation of the joinery.

[54] He noted that there was damage around the location of doors as a result of leaking joins. This was a common failure point for aluminium joinery as doors experience additional stresses at the sill which causes damage through movement and allows seepage of water onto internal door linings.

[55] The experts were also at odds as to whether the installation of building wrap behind the head flashing as opposed to over it was causative of

any damage to the house. The assessor could find no evidence of damage arising from this defect. Mr Darling opined that if the building wrap had been placed over the head flashing it would have been nailed through to hold it in place, which would itself have been a discrete cause of water entry.

[56] Mr Ball pointed to his photograph 2.15 which showed elevated moisture content recorded on the jack stud to the left hand side of the window jamb. This appeared to be the only demonstrated damage attributable to the installation of the joinery.

[57] Overall, the views of the experts were varied as to, first, whether the window and door joinery was in fact installed defectively and secondly, if so, whether that caused any damage to the dwelling directly referable to those defects. The experts did agree that the installation of the Harditex cladding to the top of the window flashings also contributed to damage at those areas. This was because taking the cladding down hard onto the top of the window flashings meant that there was no capillary break.

[58] The assessor noted that sill flashings were only suggested by James Hardie Technical Information (Feb 1996) Harditex, not mandatory.

[59] I hold that the installation of the joinery has not led to any proven damage other than in relation to the door joinery sills.

*Fifth defect - Inadequately waterproofed decks.*

[60] Mr Ball's evidence was that the deck structure and sarking as exposed is saturated with moisture and there is mould growth on the surface of the timber. The approved drawings and specifications make no reference to a provision of a waterproof membrane and it would appear that either none was installed or that those that were installed had failed.

[61] A liquid applied membrane has been applied into the deck edge gutter and is peeling adjacent to the edge of the tiles. This has contributed to water penetration into the deck structure.

[62] It is not clear whether that product was applied under the tiles as well. Both the assessor and Mr Ball thought not.

[63] This defect was the third of the secondary defects identified by Mr Ball. The assessor noted that tile deck surfaces abut wall cladding on the decks of the en suite, master bedroom and living areas. Further investigation revealed poor detailing and moisture ingress to varying degrees but no evidence of actual damage.

[64] Waterproofing of the decks at this property was either non-existent or if applied had failed. According to Mr Darling, the detail for the attachment of the deck to the dwelling itself was a “hybrid” as it was not a slot deck which is physically separated from the building nor was it face-fixed with a membrane to protect the building structure. Rather, the deck structure was bolted onto the cladding directly which lead to the possibility of water being absorbed into the cladding.

[65] The experts agreed, however, that there was no evidence of damage attributable to the fixing of the deck to the house structure and that the problem was with the waterproofing of the deck itself. The damage to the deck arose from:

- (a) The failure of the tile gutter junction at the outer leading edge of the deck; and
- (b) The penetration of water through the tiles due to no waterproofing or a failure of the waterproofing system used.

[66] Having heard the evidence of the building experts in relation to the inadequate waterproofing of the decks, I find that there is no damage proven in relation to the connection of the deck structure to the house structure, but that there was a failure to adequately waterproof the deck substrate and the leading edge of the deck gutter interface. Those failures have led to damage to the structures affected.

#### *Other minor defects*

[67] The building experts identified three other defects in the Darbys' home. They were:

- (a) Pergola beam connections to garage - This defect has caused severe decay to the garage door lintel. The damage arises from

a lack of flashing or other system to prevent water entering between the runner of the pergola and the cladding. The pergola beam connections appear to have been built as provided by the consented drawings.

- (b) Window awnings - It was agreed that there was no evidence of damage arising from the installation of the window awnings.
- (c) Skylights - Damage in the location of the skylights was noted by the assessor in his report. However, no evidence that they were leaking was found.

**(b) Was Mr Allen a developer and/or head contractor and/or project manager and did he breach any duties of care he owed to the claimants in any of those roles?**

[68] The claimants' claim against Mr Allen is that he is personally liable as the developer of this property and/or as head contractor and/or as project manager.

[69] It is not in dispute that Mr Allen was a director and shareholder of Venus Investments Limited. That company was the owner of the land. It was the vendor of the completed house to the claimants.

[70] Venus Investments Limited no longer exists. It was removed from the Companies Register on 9 May 2008. It would appear that the directors of Venus Investments, Mr Allen and his wife, simply ceased filing annual returns and allowed the company to be removed from the Register. This occurred following the settlement of the sale by Venus Investments of this house to the Darbys and the sale of a commercial property owned by the company.

[71] The claim against Mr Allen is a personal one. The claims allege that in his role as developer or head contractor or project manager, Mr Allen owed non-delegable duties of care to the claimants and that he breached them.

[72] The claimants particularise those breaches as follows. They state that Mr Allen was negligent in that he:

- (a) Caused, permitted or allowed the design of the house to be produced in a manner that lacked the information required as set out at para [25] of the claim.

- (b) Failed to ensure that the contractors and subcontractors involved in the construction of the house had sufficient training, experience and supervision to construct the house in a manner that complied with the building consent, the Building Act and the Building Code.
- (c) Failed to put in place a system of site meetings sufficient to ensure that the construction of the house complied with the building consent, the Building Act and the Building Code.
- (d) Failed to properly co-ordinate the work undertaken by the contractors and subcontractors involved in the construction of the house.
- (e) Failed to ensure that the construction of the house complied with the building consent, the Building Act and the Building Code.

[73] For his part, Mr Allen seeks to emphasise that he personally took no steps which either attracted personal responsibility to the claimants and that it was his corporate alter ego, Venus Investments Limited, that would be liable for any of the defects pleaded against him by the claimants.

[74] In *Body Corporate 188273 v Leuschke Group Architects Limited*, Harrison J stated:<sup>5</sup>

The developer and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for his own financial benefit. It is the entity which decides on and engages the builder and any professional advisors. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that a developer owes actionable duties to owners of the building it develops.

[75] At the end of the day, as Harrison J observed in *Leuschke*,<sup>6</sup> it is the function carried out by a person or entity that gives rise to the reasons for imposing a duty of care. Whether someone is called a developer, head contractor or project manager does not matter. The duty is attached to the function in the development process and not the description of a person.

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<sup>5</sup> *Body Corporate 188273 v Leuschke Group Architects Limited* (2007) 8 NZCPR 914 (HC) at [32].

<sup>6</sup> Above n5.



[76] The protection offered to a shareholder of a company does not extend to protect a director of that company if that person was sufficiently involved in the commission of a tort to justify the imposition of a duty of care.

[77] The effect of incorporation of a company is that the acts of its directors are usually identified with the company and do not necessarily give rise to personal liability.<sup>7</sup> However, as noted by Wylie J in the appeal decision in *Chee v Stareast Investment Limited*,<sup>8</sup> the concept of limited liability whilst relevant is not decisive. In particular, limited liability is not intended to provide company directors with a general immunity from tortious liability. An important consideration in this context is the degree of control that any person, including a director, had over decisions made in the construction process and the construction itself.

[78] The classic statement of this is the statement of Hardie Boys J in *Morton v Douglas Homes Ltd*:<sup>9</sup>

The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals with on the company's behalf and to those with whom the company deals insofar as that dealing is subject to his control.

[79] The Court of Appeal held that where a company director has personal control over a building operation he or she can be held personally liable. This is an indicator of whether or not his personal carelessness is likely to have caused damage to a third party.

[80] Later, in *Leushke*, Harrison J suggested that a director may also need to have assumed responsibility. He stated:

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<sup>7</sup> *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).

<sup>8</sup> *Chee v Stareast Investment Limited* HC Auckland, CIV-2009-404-5255, 1 April 2010.

<sup>9</sup> *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).

...control of the development simpliciter is not enough to found liability. There must be evidence of the director's assumption of a degree of personal responsibility for an item of work which was subsequently proved to be defective.

[81] In *Dicks v Hobson Swan Construction Ltd*,<sup>10</sup> Baragwanath J concluded that as Mr McDonald actually performed the construction of the house he was personally responsible for the defects which resulted in the house leaking and therefore personally owed Mrs Dicks a duty of care.

[82] Finally, in *Hartley v Balemi*,<sup>11</sup> Stevens J held that personal involvement does not necessarily mean that the physical work needs to be undertaken by the director, but may include administering the construction of the building.

[83] The cases focus on the twin factors of control and assumption of responsibility. In order for Mr Allen to be liable, it must be proven that he owed the Darbys a duty of care. In determining this issue I must bear in mind the presumption against an imposition of personal responsibility where the director was simply acting on behalf of the company. I need to determine whether Mr Allen carried out or controlled the development or construction work implicated in the causes of the leaks. This requires a careful analysis of what actually went on site.

[84] Much time in the hearing was spent in examining Mr Allen's role in the construction of this house.

[85] There was a stark conflict between the evidence given by Mr Allen as to the role and function he undertook on the construction of this dwelling and the evidence of Messrs French, Coutts and Hawkins. Those witnesses were really the key personnel involved in the build. Mr Duff was scheduled to give evidence and filed a brief but was regrettably incapacitated at the date of the hearing.

[86] Messrs Coutts and Hawkins were independent witnesses. They were not parties to this claim. They were, therefore, neutral as to the outcome of

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<sup>10</sup> *Dicks v Hobson Swan Construction Ltd (in liquidation)* (2006) 7 NZCPR 881 (HC).

<sup>11</sup> *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007.

the hearing. They appeared honest and straightforward in the giving of their evidence.

[87] By contrast, I found Mr Allen to be an unconvincing witness. I found his evidence to be contradictory and self-serving. He attempted to paint himself as someone with very little knowledge of building. Where there is a conflict in the evidence between that of Mr Allen and that of the other witnesses, I prefer the evidence of the other witnesses.

[88] My views about Mr Allen's credibility are supported by his conduct in signing the producer statement using (although misspelling) the name of the plasterer, Daryn McDonald.

[89] In an affidavit he swore on 26 August 2011, Mr Allen referred to a producer statement "prepared by a plasterer." That affidavit was in support of an application that he be removed from this claim. My reading of that affidavit is that he attempted to suggest that Mr McDonald completed the producer statement in issue. That is a reasonable conclusion to reach given that Mr Allen expressed the position thus:

At paragraph 17 of the statement of claim the claimants refer to a producer statement prepared by a plasterer. Neither my wife or I hired this person.

If the plasterer chose to refer to me as the contact person for Venus Investments Ltd that was most likely because he was aware that I was a director of Venus and that Venus Investments Ltd would be paying the bills.

[90] At the time that he gave this sworn statement, Mr Allen knew that he had prepared the producer statement he refers to. He chose not to state that, rather to suggest that the plasterer himself did so. That was untrue and Mr Allen knew it.

[91] That producer statement assumed some significance in the course of this hearing. In his reply brief of evidence,<sup>12</sup> Mr Allen attempted to explain away the reasons why he completed the producer statement in the name of Mr McDonald. His evidence does not ring true. Mr Allen's reply brief implied

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<sup>12</sup> Reply Brief of Evidence Anthony Lawrence Allen, 13 August 2012.

that the Council consented to or at least did not object to him completing a producer statement in the name of another party.

[92] I do not accept that the Council took that position. It had no reason to participate in the receipt of a document that was clearly a forgery.

[93] I note also that Mr Allen's original brief of evidence did not discuss the completion of the producer statement and the alleged discussion with the Council officers. That evidence was only filed following service of the brief of evidence of the Council's handwriting expert, Ms Morrell, who opined that Mr Allen was the writer of the entries on the producer statement.

[94] Finally on this issue, there was a letter which Mr Allen produced in his reply brief. That letter was a handwritten one dated June 2002. It purports to record that Mr Allen advised the Council that he had completed the producer statement on behalf of Mr McDonald. The Council has searched but cannot find that letter in its records.

[95] I do not accept that Mr Allen forwarded that letter to the Council. Rather, my view is that the letter was produced by Mr Allen subsequently in a belated attempt to explain away his deceit.

[96] Another part of Mr Allen's case was that Venus Investments Limited had engaged Mr French on two earlier occasions in 1993 and 1995 to conduct building work for it. Venus Investments was only incorporated on 10 February 1997. It cannot have engaged Mr French. Mr Allen was incorrect.

[97] Mr Allen summarises his role in the construction of the dwelling as being simply the human agent of Venus Investments and that he had no building qualifications or expertise and did not participate directly in the building process in any capacity.

[98] Mr Allen argues that his role was to undertake administrative tasks only, for example, uplifting delivery documents from Mr French and to attend the building site on a weekly basis on a Friday to "provide a shout" for the construction team. He says that the only work he did was to prepare the cedar weatherboards for installation.

[99] Mr Allen's role in the construction of this house was significant. It was wide-ranging and covered most aspects of the construction project. It was sufficient for him to have assumed a personal responsibility to the claimants quite separate from his role as the director of Venus Investments Limited.

[100] I have already referred to the classic statement of the situation when personal liability will arise given by Hardie Boys J in *Morton v Douglas Homes Limited*.<sup>13</sup>

[101] Keeping those considerations in mind, I now turn to outline the reasons why I consider Mr Allen to have undertaken a central controlling role in the construction of this dwelling.

[102] Mr Allen has alleged that Mr French was the "go to" guy for the Council and engineer. The documentary evidence does not support this allegation. There is no correspondence between the Council and Mr French or the engineer and Mr French.

[103] When Mr Allen was questioned regarding the engineer, he changed his evidence and stated that the engineer communicated with him because the engineer was an acquaintance of his.

[104] Mr Allen later conceded that it would have been him or Venus Investments who engaged the engineer, not Mr French. This is in contrast to his earlier evidence and the correspondence in relation to the construction project between the Council and Mr Allen. He was clearly the nominated person in relation to this project as far as the Council was concerned.<sup>14</sup>

[105] Mr Allen was also in contact with the Council regarding construction. I refer here to the Council's field notes,<sup>15</sup> in particular, page 177 which clearly records discussions with Mr Allen. He acknowledged being present at Council inspections.

[106] Mr Allen also alleged that neither he nor his wife had any input into the design or construction of the house. However, in cross-examination three letters were produced signed by Mr Allen personally to the architect which

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<sup>13</sup> Above n9.

<sup>14</sup> Agreed Bundle of Documents at pages 131, 159, 161, 162, 167, 171 and 172.

<sup>15</sup> Agreed Bundle of Documents pages 175-181.

contained detailed requests to the architect in relation to the changes to the house plans.<sup>16</sup> He was clearly very much involved in the design of this house. He signed the application for building consent and added Mr French's name as the "builder" without Mr French's consent or knowledge.

[107] Mr Allen also alleged that Mr French engaged the subcontractors on the house. His evidence was that Mr French was in overall control of everybody, including the engagement of the various subcontractors.

[108] However, again this evidence did not withstand scrutiny. Mr Allen was eventually forced to admit that either he or Venus Investments engaged the architect, the engineer, Mr Hawkins, Mr Coutts, Mr French, Mr McDonald, the electrician, the second plasterer, the person who put the eyebrow over the windows, the roofer and the tiler.

[109] Mr Allen's evidence was that he met with Mr McDonald and showed him the plans and that he received a quote from him. He discussed a warranty before deciding on employing the plasterer.

[110] He stated that he would use quotations to decide on whether or not to employ subcontractors as it was "his" money being spent on the project. The selection and engagement of all the subcontractors on this project paints a very different picture as to the level of involvement from that he tried to portray. Clearly, Mr Allen was the person who engaged the contractors on this project.

[111] This is supported also by reference to Mr French's bank account statements which he produced. They showed payments being received from A L Allen, not Venus Investments Limited. These direct payments bring into sharp focus Mr Allen's central role in the construction of this house.

[112] Mr Allen was also responsible for a critical change in the construction materials used in this house. The consented Council's plans showed that the house was to be constructed from Hardibacker. Mr Allen decided to change that substrate to Harditex. That was a decision driven by cost considerations. He did not obtain an amendment to the consented plans. He stated that he

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<sup>16</sup> Agreed Bundle of Documents pages 7-9.

instructed the architect to attend to that, but there is no evidence of that instruction.

[113] His original brief of evidence attempted to distance himself from the change,<sup>17</sup> but again, on cross-examination he admitted that he had called for the change. That accords with the content of his letter.<sup>18</sup>

[114] His evidence about his lack of knowledge about the need to advise the Council of this and whether or not Mr French or the architect was responsible for that was again ambivalent and unconvincing. He decided to change the cladding system used on this house. It was his responsibility to ensure that the Council was notified of this change and furthermore, that the change was properly implemented when the house was being constructed.

[115] One of the critical defects in this house is the inadequate separation between the base of the cladding and the surrounding landscaping or concreting. Mr Allen attempted to argue that Mr French and the other subcontractors engaged by Mr French constructed the concrete driveway. He later changed his evidence to say that Mr French and Mr Duff installed the timber boxing for the driveway and assisted the concrete suppliers with the actual concrete work.

[116] Very shortly before the hearing commenced, Mr Allen produced a series of photographs. They had not previously been discovered. Mr Allen argued that they supported his position that Mr French and Mr Duff had laid the driveway. I do not accept that those photographs show either Mr French or Mr Duff carrying out that work.

[117] The photographs Mr Allen attempted to rely on were photographs of workers employed by Atlas Concrete. There are clearly wearing Atlas Concrete branded shirts. Mr French gave evidence that he was no longer on site at the time the driveway was laid and that he had moved on to another job. I accept that evidence.

[118] There was also an issue about the tiling of the decks. While he cannot expressly state that he saw Mr Allen applying a waterproof membrane to the decks, Mr French's evidence was that he saw Mr Allen with a

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<sup>17</sup> Brief of Evidence of Anthony Lawrence Allen, 12 June 2012 at [42]-[45].

<sup>18</sup> Agreed Bundle of Documents page 8.

waterproofing product in the vicinity of the deck areas. He recalled Mr Allen with an open tin looking at the contents.

[119] One of the issues in the failure of this house is the absence of waterproofing to the decks or its defective installation and the defectively applied waterproofing to the deck gutter junction. Whilst I cannot conclude that Mr Allen did attend to the waterproofing, I do find that Mr French did not carry out that task. The fact that Mr Allen had sourced the waterproofing product for application is further evidence of his central role for construction of this house. Whether he applied it or not (and I incline to the view that he did), he was clearly thinking of waterproofing and arranging for that work to be done.

[120] I also note the evidence of Mr Hawkins to the effect that Mr Allen was regularly on site and that he was to be seen wearing shorts and a tool belt on occasion. Mr Hawkins said that Mr Allen was there almost daily, working around the site and organising things. Mr Hawkins recalled Mr Allen putting up gib in the interior of the house.

[121] Mr Hawkins' evidence was given in an honest and credible way. He had no reason to give anything other than his honest recollection of what occurred on site. What Mr Hawkins said occurred on site was Mr Allen regularly being there, directing work, scheduling contractors on site, arranging payment and generally occupying a central role.

[122] By reference to the analysis above, it would seem to me that Mr Allen's role fits perfectly within the analysis of the Court of Appeal in *Morton* and Harrison J's statements in *Leuschke*. Mr Allen's role in the construction of the house included the coordination, direction and oversight of the planning and design of the house. He made design decisions, including the critical change to the cladding material used. He must also have directed other changes to the consented plans as referred to in the Assessor's Report.<sup>19</sup> He was the person with which the Council liaised in relation to the construction. On one occasion, Mr Allen personally requested a Council inspection. He was present when inspections were carried out by the Council. He also paid some of the contractors personally. Mr French's bank statements support this. Mr Coutts' evidence was also that he was personally engaged by Mr Allen, as

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<sup>19</sup> Assessor's Report dated 27 September 2010, page 6.



was Mr Hawkins' evidence. Mr Allen supplied the materials including the pre-cut framing from Tanners Timber. He had an account with that organisation.

[123] To summarise, Mr Allen's role and responsibility in the construction of this house included:

- (a) Coordinating the planning and design of the house.
- (b) Determining to make a significant change to the cladding substrate.
- (c) Making other changes as identified by the assessor in his report.
- (d) Liaising and overseeing compliance with Council requirements.
- (e) Supplying the materials for the house.
- (f) Engaging and paying subcontractors.
- (g) Controlling and overseeing all subcontractors' work.

[124] Mr Allen was the directing, co-ordinating and overseeing person in relation to the construction of this house.

[125] It is immaterial whether I characterise that responsibility as being that of a developer, a head contractor or a project manager. Mr Allen assumed a personal responsibility and, therefore, a legal duty, to subsequent owners for the way this house was constructed. It was constructed defectively. That is his responsibility.

**(c) Was Mr Allen liable to the Council in deceit?**

[126] Auckland Council, in addition to its cross-claims against Mr Allen as project manager pleads a separate cross-claim against Mr Allen in deceit.

[127] That claim proceeds on the basis of Mr Allen's conduct in lodging with Council a producer statement apparently signed by the plasterer. I find that it was presented to Council on the basis that it was from the plasterer and was not given to the Council on the basis of the letter attached to Mr Allen's reply brief and dated 13 or 15 June 2002.

[128] Auckland Council referred to *Amaltal Corporation Limited v Maruha Corporation*<sup>20</sup> where the Court of Appeal confirmed that the tort of deceit involves:

- a) A false representation as to a past or existing fact made by a defendant who knew it to be untrue or had no belief in its truth or was reckless as to its truth; and
- b) Intention by the defendant that the claimant should have acted on the representation; and
- c) Action by the claimant in reliance on the representation; and
- d) The claimant must suffer damage as a result of relying upon the representations.

[129] It follows from my findings about Mr Allen's conduct above that he made a false representation when he lodged the producer statement which was purportedly given to him by the plasterer. In doing so, he clearly intended the Council to rely on that. It states below they asked for a warranty but accepted a producer statement. The building consent application referred to producer statements and the Council sought a warranty for the plaster system cladding and the applicator's details in its letter of 16 April 2003.<sup>21</sup>

[130] In response to that, Mr Allen forwarded to the Council a producer statement seemingly issued by McDonald Textures. It appears that the Council was satisfied with that instead of a warranty and it then issued the code compliance certificate.

[131] Accordingly, I find that it was intended by Mr Allen that the Council would rely on the producer statement and that he knew that Council would do so.

[132] I also accept that the Council acted in reliance on the representation made by Mr Allen as to the plaster system producer statement apparently given by the supplier.

[133] Finally, I agree with the submission of Council that damage arose as a result of the production of the falsified producer statement. That is because the Council would have, on the evidence it produced, taken steps to satisfy

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<sup>20</sup> *Amaltal Corporation Limited v Maruha Corporation* [2007] 1 NZLR 608 (CA).

itself that the plaster work done at the property complied with the Building Act and Code if the producer statement was not provided.

[134] I do not, however, consider that the deceit claim is a complete answer to the issue of apportionment which I discuss at the end of this determination. The reason for that is because the building suffered from other defects which the Council approved in its code compliance certificate and which do not relate to the plaster work.

[135] Those defects include the insufficient cladding clearances to the adjacent ground which are not related to the producer statement but which relate to the alteration of ground levels around the perimeter of the building. Those ground levels would have been identifiable by the Council at the time it issued its code compliance certificate. They are unrelated to the plasterer's producer statement.

[136] Secondly, the pergola beam connections to the garage are nothing to do with the plasterer's producer statement and would also have been in situ at the time the code compliance certificate issued.

[137] Accordingly, I find that the Council's cross-claim in deceit is proven against Mr Allen and the effect of that claim is addressed in the apportionment of responsibility between respondents.

**(d) Was Mr French the builder of the claimants' home and did he breach any duty of care owed to them?**

[138] The claimants advanced a claim against Mr French on the grounds that he was the builder and as such owed a duty of care to them to exercise reasonable care and skill to ensure the construction complied with the building consent, Building Act and Building Code.

[139] The legal position regarding such a liability is uncontroversial.<sup>21</sup> The claimants and the Council both argue that Mr French was the builder and in that role had an overriding duty to ensure the completed property was constructed correctly in terms of the Building Act and Building Code.

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<sup>21</sup> Agreed Bundle of Documents page 167.

<sup>22</sup> *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA).

[140] Mr French on the other hand says that he was a labour only carpenter engaged by Venus Investments or Mr Allen to carry out carpentry work only to a certain stage. He was paid an hourly rate. He says that it was not his role to supervise other contractors and that he did not actually do that. He says that he left the site before the plastering work was undertaken.

[141] Before I turn to consider the main defects and Mr French's responsibility for those, I start by outlining my findings on the role that he undertook in relation to the construction project. I found Mr French to be an honest and reliable witness.

[142] Mr French was retained on a labour only basis. That much is clear from the fact that he was not paid any additional amount to manage the construction project, did not supervise or direct the subcontractors and did not remain on site for the duration of the construction. Whilst he owed duties of care to the Darbys, the extent of those duties is circumscribed by the actual duties he carried out for Mr Allen or Venus Investments. That is to say, he was responsible only for his own work, not the final work product.

[143] As Williams J stated in *Boyd v McGregor*:<sup>23</sup>

... labels are an arid ground for debate: in issue are the functions assumed by those said to be liable, what legal obligations may flow from the assumptions of those functions, and whether those obligations have been breached.

[144] Later, he stated:

...attempts to differentiate between the roles of people based on their descriptions as "builder" or "contractor" creates an artificial distinction when all play their respective parts.

[145] I take this to mean that calling Mr French a labour only contractor or a builder or indeed even the head contractor does not assist the issue of his possible liability. What is needed is to analyse, first, what was his role, secondly, what tasks did he undertake or duties did he assume pursuant to

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<sup>23</sup> *Boyd v McGregor* HC Auckland, CIV-2009-404-5332, 17 February 2010 at [28].

that role, and thirdly, did he breach any of those duties causing loss to the Darbys?

[146] Mr French was engaged in the period from the start of 2000 until around June or July 2000. During that time, he:

- (a) Prepared the footings and foundations.
- (b) Framed up the house with the pre-nailed frames supplied by Mr Allen.
- (c) Installed the Harditex cladding on the exterior.
- (d) Installed the window and door joinery.
- (e) Completed interior linings and finishings.

[147] He corrected his brief of evidence at the start of the hearing by confirming that he constructed the solid balustrade around the main deck off the lounge, at least on the right hand side and constructed the left hand side pergola.

[148] Mr French left the construction site after completion of this work, which was in June or July 2000. He returned briefly about six months later, for three or four days, to install soffits under the deck and the framing of a rail.

[149] As Mr Hawkins makes clear, at the time that Mr French left the site, there was much still to be done. That work included:

- (a) Waterproofing of the decks;
- (b) Concreting of the driveway;
- (c) External tiling of decks;
- (d) Landscaping;
- (e) Cladding around external posts;
- (f) Metal caps on the parapets;
- (g) Covers over the windows.

[150] I find that Mr French's role was limited to just those areas where he admitted his role extended to. He did not have the overall, "full contract", role that Mr Allen alleges he did. Like so many homes built in this era, one of the issues that arose was a lack of a final co-ordinating person in charge of

scheduling and organising the sub-trades. If any person fulfilled that role, it was Mr Allen.

[151] One of Mr Allen's allegations against Mr French is that he was the project manager responsible for all aspects of the construction and was paid a margin over the amount of his hourly rate for that responsibility. As with many of Mr Allen's assertions, that was not borne out by the evidence. There was no documentary support for this claim.

[152] Mr French produced his bank statements, although it is difficult to tell from them whether or not a project management fee was paid to Mr French, I accept his evidence that he was only paid on an hourly basis. I accept that he was not paid a contractor's margin or any payment for the supervision or management of the subcontractors.

[153] Nor were there any payments paid by Venus Investments or Mr Allen to Mr French for the subcontractors. Mr Allen paid the subcontractors directly.

[154] There is no complaint about the foundations and footings constructed by Mr French, nor is there any complaint about the method of installation of the pre-cut framing.

[155] There are issues about the installation of the Harditex cladding. That was installed by Mr French.

[156] One of the main criticisms made by the claimants is the lack of control joints installed in the cladding. I have already held that there are a number of areas in this house that did not require control joints, as the length of the relevant wall areas were not sufficient to require control joints. However, there is at least one or more areas in excess of 5.4 metres which would have required a control joint with this Harditex product used. There is also the inter-storey joint which was not installed. There are questions about the contribution of the lack of those discrete control joint areas to the damage suffered by the cladding to this house. My finding is that the joints would have failed anyway on this house due to the poor workmanship of the plasterer, who was not a party to this claim.

[157] Mr French's evidence is that when he was installing the framework he was advised by Mr Allen that they would be installing Harditex instead of Hardibacker. No explanation for that change was given, although it now transpires that the decision was made due to costs considerations on the part of Mr Allen.

[158] On receipt of that advice from Mr Allen, Mr French turned his mind to the issue of control joints. He contacted Mr Allen's architect, Lee-Anne Eddy about this change and the need for control joints. She had prepared the consented plans, albeit that they specified Hardibacker. He asked her before he commenced fixing the cladding where and how he should place control joints.

[159] The architect advised him that she had designed the house with varying levels or plains such that there was no need for control joints. That is, he was told that he did not need to install control joints. This comment is supported in part by the building experts' evidence that there were few areas that actually required control joints on this cladding. The architect was uniquely placed to advise on the need for control joints, as she would have had the requisite knowledge and had designed the house.

[160] In *Hooft Van Huijsduijnen v Woodley*,<sup>24</sup> the builder turned his mind to a construction issue, in that case, the recommended clearances in the base of the cladding and the ground levels. The architect specified clearances less than the manufacturer's recommendations. The builder's evidence is that he had followed the design of the architect. In the first instance Tribunal hearing, the Tribunal concluded that it could not say that the builder had been negligent as a result of constructing the dwelling as per the plans.

[161] In the present case, Mr French turned his mind to the issue of control joints. He was engaged on a labour only carpentry role for Mr Allen on this project. Notwithstanding that limited role, he still undertook to install the cladding and thereby assumed a duty of care to others in relation to that work.

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<sup>24</sup> *Hooft Van Huijsduijnen v Woodley* [2012] NZHC 2685.

[162] However, I consider that he discharged that duty of care by inquiring with the architect as to the location and the manner of construction of the control joints in the cladding. He sought advice from an expert, a qualified architect who had been responsible for the preparation of the plans.

[163] In addition the primary cause of the failure of the cladding system is the delamination of the jointing plaster, cladding cracks and the darkness of paint used, not the installation of the cladding sheets themselves. Mr Allen determined the colour this house was painted in.

[164] In relation to those areas where a control joint should have been installed, the evidence of the experts is that failure would have occurred in any event, due to the defective plastering work and the dark coloured paint. The lack of control joints in the few areas that actually required them is not the reason for this cladding system failing.

[165] Accordingly, Mr French is not responsible for this defect.

[166] The second defect is that the cladding is too close to the ground in many areas. There are two main areas of failure. First, the cladding is now too close to the paved driveway surfaces and entrance ways and secondly, the cladding is hard down to tiles on the first floor north east facing deck.

[167] Mr French was not responsible for the concreting of the driveway or entrance area to the house and is, therefore, not liable for the separation between cladding and hard surfaces in this area. This work was arranged by Mr Allen.

[168] Mr Hawkins' evidence was that the cladding had a separation from the existing ground levels when he completed the installation of the Harditex fibre cement sheets. This much can be seen in photograph five of Exhibit "D". The concreting of the driveway and entrance way altered those levels. That was nothing to do with Mr French.

[169] Mr French was not involved in the tiling of the decks which, as built, have insufficient clearance between the cladding and the tile surface. He was not aware that the decks were to be tiled. Therefore he is not responsible for any lack of clearances between the cladding and the tiled surface.



[170] The third defect is the insufficiently waterproofed horizontal surfaces of the balustrade and parapet walls. The evidence of the experts in this area was that this was the role undertaken by either the builder or the plasterer. Given the confined role that Mr French played and his early departure from the building site following the installation of the cladding sheets themselves, I do not consider that it was part of his role to carry out weatherproofing to the surfaces. There was no evidence that that was a part of his function. Mr French gave evidence that he understood that pre-finished steel flashings were to be fitted, by the roofer or Mr Allen. He had no responsibility for this part of the work.

[171] Rather, it was the responsibility of either the roofer or the plasterer who failed to properly waterproof these surfaces or it is a scheduling failure in that Mr Allen failed to make it clear to Mr French or the roofer or the plasterer whose role that was. Either way, I find that Mr French is not responsible for this defect.

[172] The fourth defect is the inadequately installed flashings to window and door joinery. There was dispute about whether all of or some of the head flashings were too short and whether the joinery had been installed correctly. Notwithstanding that, there was little or no evidence of actual damage arising from this defect. The only evidence of damage arising from the head flashing installation was that identified by Mr Ball and that evidence was contested by the other experts. I find that the claimants have not proven that damage in that one area is referable to the installation of the head flashing by Mr French.

[173] The experts agreed that the installation of sill flashings were not prescribed by the relevant technical literature nor did that step represent usual trade practice.

[174] Accordingly, I find that Mr French is not liable for this defect.

[175] The fifth defect is the inadequately waterproofed decks. It was not part of Mr French's role to carry out waterproofing to the decks on this property. That was a role either forming part of Mr Allen's supervisory role or a role he undertook himself. Mr French was not responsible for ensuring that the decks were waterproof. He is not liable for this defect.

[176] There were certain other defects mentioned in the hearing which were of only secondary importance. Overall, they were of far less significance than the primary defects. The only minor defect raised at the hearing was the pergola beam connections to the garage. Mr French did not install those. It is not known who did.

[177] Other defects mentioned by the assessor, but not raised in the hearing, included:

- (a) Scuppers poorly formed- this work was not undertaken by Mr French and he cannot be liable for it.
- (b) Apron flashing terminations- this work was not undertaken by Mr French and he cannot be liable for it.

[178] Having considered the confined labour only role undertaken by Mr French and the fact that he was not responsible for anybody's workmanship other than that of Mr Duff and Mr Hawkins, and the fact that none of the primary damage in existence at this house was his responsibility, I am unable to conclude that Mr French has breached any duty of care he owed to the claimants or that if he did it has caused damage.

[179] Accordingly, the claim against Mr French is dismissed.

## **CONCLUSION AND ORDERS**

[180] Having heard the evidence presented at this hearing, the expert evidence and having seen the submissions of the parties, I find as follows:

- (a) The Auckland Council is liable to the claimants in terms of its admission and my partial determination dated 18 December 2012.
- (b) Mr Allen is liable to the claimants in his personal capacity as a developer, alternatively, he is liable personally to the claimants in his role as head contractor or project manager. He is liable for 100 per cent of the loss.
- (c) Mr French is not liable to either the claimants or any other respondent pursuant to the cross-claim pleaded against him.

[181] There remains the issue of apportionment between the respondents. In this case, the liable respondents are Council and Mr Allen.

[182] From a causative potency viewpoint, I agree with Council's submissions that Mr Allen's breaches of the duty he owed to the claimants were more significant than that of the Council. The Council was simply careless in its consent, inspection and certification regime. That carelessness caused the claimants' loss, a factor which the Council admitted liability for. It is responsible for 100 per cent of the losses suffered in the agreed quantum amount of \$511, 611.

[183] Mr Allen, too, is jointly and severally responsible for 100 per cent of the loss suffered by the claimants in the amount of \$511,611.

[184] As between the Council and Mr Allen, I apportion the liability between them in the proportions of 85 per cent liability to Mr Allen and 15 per cent liability to the Council.

[185] This takes into account the fact that the Council did rely on the falsified producer statement provided by Mr Allen but also the Council's own negligence overall. It cannot escape those consequences but Mr Allen is by far the greatest contributor to the losses suffered.

[186] That apportionment takes account of the separate cross-claim pleaded by Council against Mr Allen in deceit and which I have also found proven. Having done so, I consider that the proportions of 85 per cent liability to Mr Allen and 15 per cent liability to the Council remain appropriate taking into account the separate finding on the deceit claim.

[187] The full amount of the claim established is \$511,611. That claim is comprised as follows:

Estimated repair costs	\$395,000
Pre-remedial costs	\$62,078
Consequential losses	\$22,533
General damages	\$25,000
Interest	\$7,000
<b>TOTAL</b>	<b>\$511,611</b>

[188] The claim by Vaughn Stuart Darby and Mary Ann Darby as trustees of the Darby Trust is proven to the extent of \$ 511, 611. Auckland Council and Anthony Lawrence Allen are jointly and severally liable for this amount to the claimants.

[189] For the reasons set out in this determination and my earlier partial determination, I make the following orders:

- (a) Auckland Council is to pay the claimants the sum of \$511,611 forthwith. The Council is entitled to recover a contribution of up to \$434,869.35 from Mr Allen.
- (b) Mr Allen is to pay the claimants the sum of \$511,611 forthwith. Mr Allen is entitled to recover a contribution of \$76,741.65 from Auckland Council.

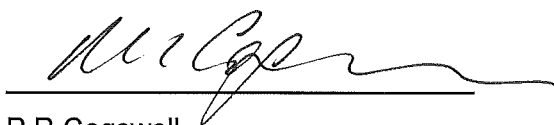
[190] To summarise, if the two liable parties meet their obligations under this determination, this will result in the following payments being made by the liable respondents in this claim:

First Respondent, Auckland Council	\$76,741.65
Second Respondent, Mr Allen	\$434,869.35

[191] If either of the parties listed above fails to pay its or his apportionment, then this determination may be enforced against either of them up to the total amount they are ordered to pay as set out above.

[192] I order that interest on the above amounts as between the Council and Mr Allen is to run at the rate prescribed by the Act from the date the Council paid the amount to the claimants to the date of payment of his apportioned share.

**DATED** this 8<sup>th</sup> day of February 2013



P R Cogswell

Tribunal Member